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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 TAMMY MANOR,)
09 Plaintiff,) CASE NO. C10-5944-JLR
10 v.)
11 MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
12 Defendant.) APPEAL
13 _____)

14 Plaintiff Tammy Manor proceeds through counsel in her appeal of a final decision of the
15 Commissioner of the Social Security Administration (Commissioner). The Commissioner
16 denied plaintiff's applications for Supplemental Security Income (SSI) and Disability
17 Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ).

18 FACTS AND PROCEDURAL HISTORY

19 Plaintiff was born on XXXX, 1970.¹ She dropped out of high school in the eleventh
20 grade, obtained a GED, and attended one semester of community college. (AR 55, 368.) She

21 _____
22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Civil
Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files,
pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 previously worked as a cleaner, driver, cook, and food service manager. (AR 210.)

02 Plaintiff filed applications for DIB and SSI in March 2007, alleging disability beginning
03 June 1, 2006, based on chronic neck, back, and shoulder pain resulting from a car accident in
04 2001, as well as post-traumatic stress disorder (PTSD), depression, high blood pressure, cysts,
05 digestive problems, night terrors, right ear hearing difficulties, and memory problems. (AR
06 199.) Her applications were denied at the initial level and on reconsideration, and she timely
07 requested a hearing.

08 ALJ Marguerite Schellentrager held a hearing on April 5, 2010, taking testimony from
09 plaintiff, vocational expert (VE) Steve Duchene, and lay witness Kristine Southard. (AR
10 31-78.) On May 11, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR
11 10-23.)

12 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
13 on November 9, 2010 (AR 1-3), making the ALJ's decision the final decision of the
14 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

15 DISCUSSION

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
18 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
19 not engaged in substantial gainful activity since the alleged onset date. (AR 12.)

20 At step two, it must be determined whether a claimant suffers from a severe impairment.
21 The ALJ found that plaintiff has the following severe impairments: lumbar fusion; carpal tunnel
22 syndrome, bilateral; uterine fibroids; depression; PTSD; panic disorder and polysubstance

01 abuse. (*Id.*)

02 Step three asks whether a claimant's impairments meet or equal a listed impairment.
03 The ALJ concluded that plaintiff did not have an impairment or combination of impairments
04 that met or medically equaled a listing. (AR 14-15.)

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has
07 demonstrated an inability to perform past relevant work. The ALJ found plaintiff capable of
08 performing sedentary work as defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a), except that
09 she should avoid any reaching with the right arm above the shoulder and should only work with
10 things and not people. (AR 15-21.) With this RFC, the ALJ found plaintiff unable to perform
11 her past relevant work. (AR 21.)

12 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
13 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
14 an adjustment to work that exists in significant levels in the national economy. With the
15 assistance of the VE and consideration of the Medical-Vocational Guidelines, the ALJ found
16 plaintiff able to perform other jobs, such as assembler or bonder. (AR 22.)

17 This Court's review of the ALJ's decision is limited to whether the decision is in
18 accordance with the law and the findings are supported by substantial evidence in the record as
19 a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
20 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
21 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
22 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which

01 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
02 F.3d 947, 954 (9th Cir. 2002).

03 Plaintiff argues that the ALJ erred in (1) relying on the Cooperative Disability
04 Investigations Unit (CDIU) report in violation of plaintiff's due process rights; (2) evaluating
05 plaintiff's testimony; (3) evaluating the medical source opinions; (4) evaluating Ms. Southard's
06 lay witness testimony; and (5) failing to develop the record further with respect to plaintiff's
07 alleged mental impairments. Plaintiff requests remand for further administrative proceedings.
08 The Commissioner argues that the ALJ's decision is supported by substantial evidence and
09 should be affirmed.

10 Due Process Rights

11 In August 2007, Detectives Monteer and Liburdi from the CDIU conducted an
12 investigation to resolve inconsistencies in reported functioning, daily activities, and limitations
13 in plaintiff's claim as reported by the Disability Determinations Services office. (AR 779.)
14 The detectives interviewed the manager of the trailer park where plaintiff resides with her life
15 partner, Kristine Southard, as well as a neighbor in the trailer park. (AR 781-83.)

16 The CDIU report describes the interview with the manager as follows:

17 The manager described MANOR and Southard as manipulating and always
18 looking for someone to file a law suit against. Monteer asked about MANOR's
19 ability to function, to which the manager replied MANOR is addicted to pain
killers. The manager told Monteer that MANOR and Southard ride on a
motorcycle together and she has seen them in the past month doing this.

20 The manager also told Monteer that MANOR and Southard take their motor
21 boat out and have done it several times this year. According to the manager,
22 she has seen both MANOR and Southard participating in hooking up the boat
for towing. The manager has also seen MANOR driving a motor vehicle,
which she does often.

(AR 781-82.) The CDIU report describes the detectives' interview with plaintiff's neighbor as follows:

Monteer then spoke to a neighbor and learned that this neighbor had information about MANOR having back surgery approximately five years ago. This neighbor told Monteer that MANOR and her girl friend have called the police on a neighbor and claimed that he was a peeping Tom even though it was not true. Monteer asked why they would do something like that, the neighbor told Monteer that they (MANOR and Southard) did not like the guy and he eventually moved. This neighbor also told Monteer that they (MANOR and Southard) poisoned plants of a neighbor and caused damage to another neighbor's trailer by pulling parts of the molding off. This neighbor told Monteer that MANOR and Southard are mean people and she fears them.

The neighbor was aware that MANOR takes up to 18 pain killer pills a day. Monteer asked about MANOR's ability to understand things and her overall appearance. The neighbor told Monteer that MANOR is very sharp and does not miss a thing.

Monteer also learned from this neighbor that MANOR and Southard took their boat out a couple of weeks ago. Monteer learned that they both were involved with hitching and unhitching the boat. The neighbor described MANOR's movements in terms of agility as normal.

(AR 782.)

The detectives then employed a ruse to engage Ms. Southard in a telephone conversation in which "[s]he told Monteer that MANOR and her work two days a week at Tacoma Foot and Ankle [Clinic]." (*Id.*) Continuing the ruse, the detectives arranged to meet plaintiff and Ms. Southard at the clinic the next day. (*Id.*) The CDIU report describes that meeting as follows:

At approximately 10:25 a.m., Monteer observed MANOR driving the blue Toyota 4 Runner, she turned into the complex. Monteer notified Detective Liburdi who was on foot inside the complex.

Liburdi was able to observe MANOR park the vehicle in the complex. She

01 then exited the vehicle without any problems, carrying a purse and other items in
02 her hands. She displayed no outward signs of discomfort. MANOR was
03 dressed in a nurse outfit. Southard (who was also wearing a nurse's outfit) was
04 observed exiting the front passenger seat, reached into the back and retrieved a
05 walker that she set up for an elderly lady who was exiting the right rear
06 passenger seat. Both Southard and MANOR assisted this elderly woman into
07 the Foot and Ankle office. The distance from the vehicle to the office was
08 approximately 25 yards.

09 Several minutes later Monteer contacted the Tacoma Foot and Ankle office and
10 employed the same ruse. Monteer observed both women wearing nurse outfits,
11 MANOR was wearing a darker blue suit and Southard's was light blue.
12 MANOR introduced herself to Monteer, she was smiling and very friendly, she
13 had make-up on and her hair was neatly arranged. Monteer presented several
14 photos to MANOR who was standing. She peered at them intently and told
15 Monteer that she recognized one of them. Monteer asked her what was the
16 name of the individual and she read the name to Monteer. She also read the
17 address associated with the photo. Monteer asked her if she was sure about the
18 picture and she told Monteer that she has a good memory. Southard confirmed
19 this by telling Monteer that MANOR has, "A great memory."

20 Monteer learned from MANOR that her and Southard assist at the office two
21 days a week and help with answering phones, filing, and patient assistance with
22 obtaining preliminary information regarding their injuries and sometimes help
patients with sitting and standing.

Both detectives observed that MANOR exhibited no physical difficulties or
limitations whatsoever. MANOR was pleasant and cooperative and was able to
follow the conversation and respond without hesitation.

(AR 782-83.)

Plaintiff argues that the Commissioner's reliance on the CDIU investigation in this case
fails to satisfy the procedural due process protections required. She states that the detectives
made a number of errors in their investigation: no effort was made to collect objective evidence
such as recordings or pictures of the event; to contact the managers or other employees at the
clinic to confirm that plaintiff worked there; or to obtain first-hand descriptions from the
neighbor and manager at the trailer park. Plaintiff further argues that she was given no

01 opportunity to confront these witnesses and this report would not have been admissible in any
02 other judicial forum. (*Id.*) Plaintiff asserts that due process protections apply in the context
03 of Social Security administrative hearings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Bayliss*
04 *v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005).

05 Plaintiff points to the three-step balancing test articulated in *Mathews*, 424 U.S. at
06 334-35, requiring the Court to consider: (1) the interest at issue; (2) the risk of erroneous
07 deprivation through the procedures used and the probative value of additional procedural
08 safeguards; and (3) the government’s interest. However, the *Mathews* Court addressed and
09 confirmed an individual’s statutorily recognized “property interest” in continued receipt of
10 Social Security benefits once they have been awarded. *Id.* at 332. In other words, it is the
11 termination of that property interest which implicates due process. *Id.* Plaintiff’s reliance on
12 *Mathews*, therefore, is misplaced.

13 Plaintiff otherwise relies on the Ninth Circuit’s decision in *Bayliss* in arguing that the
14 ALJ’s reliance on the CDIU report rendered the proceedings fundamentally unfair. To
15 succeed in such a claim, plaintiff must show that “the ALJ’s behavior, in the context of the
16 whole case, ‘was so extreme as to display clear inability to render fair judgment.’” *Bayliss*,
17 427 F.3d at 1214-15 (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)).

18 In evaluating plaintiff’s *Bayliss* claim, the Court begins with a presumption that the ALJ
19 was unbiased. *Id.* (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). Plaintiff can
20 rebut this presumption by showing a “‘conflict of interest or some other specific reason for
21 disqualification.’” *Id.* (quoting *Schweiker*, 456 U.S. at 195). However, the Court is free to
22 reject allegations “that due process was violated when isolated parts of an ALJ’s conduct were

01 challenged but the record as a whole showed fundamental fairness for the litigants.” *Id.* at
02 1215-16.

03 The ALJ relied, in part, on the CDIU report in finding plaintiff not credible. (AR 18.)
04 The ALJ additionally limited the weight given to the opinions of the Department of Social and
05 Health Services (DSHS) examiners, in part, because of “the significant reliance they appeared
06 to have placed upon the subjective allegations of an individual with documented credibility
07 issues[.]” (AR 19.) The ALJ also limited the weight given to Dr. Brian Esparza’s opinion, in
08 part, because it “appeared to be influenced by the self reports of the claimant[.]” (*Id.*)

09 Plaintiff had ample opportunity to challenge the CDIU report, and did, in fact, challenge
10 it twice. (AR 34-35, 278-82.) At the hearing with the ALJ, plaintiff’s attorney objected to the
11 admissibility of the CDIU report. (AR 34.) The ALJ responded as follows:

12 I will consider your objection. I have reviewed that. The fact that it may or
13 may not be hearsay goes to the weight that I will give it and I will keep it in the
14 record and ask some questions about it, about some of the things in there to give
your client an opportunity to help me understand some of that.

15 (AR 35.) The ALJ proceeded to question plaintiff about numerous issues addressed in the
16 CDIU report, including her use of prescription drugs, her experiences riding on a motorcycle
17 and boat, and her alleged employment at the Foot and Ankle Clinic. (AR 40-43.) Plaintiff
18 was also given an opportunity to respond to questions from her attorney. (AR 45-64.)

19 Six days after the hearing, but nearly a month prior to the ALJ’s decision, plaintiff
20 submitted a letter to the ALJ further objecting to any use of the CDIU report. (AR 278-82.)
21 She also submitted a declaration specifically refuting the allegations contained in the report and
22 providing innocent explanations for the observations by the investigators. (*Id.*)

01 Plaintiff does not explicitly argue the ALJ is biased, but does state that “[t]he
02 Commissioner’s blind reliance on this report at all levels of review robbed the disability review
03 process of any semblance of fundamental fairness and violated plaintiff’s due process rights.”
04 (Dkt. 15 at 8.) Plaintiff points to no conflict of interest that would bias the ALJ’s decision.
05 The only specific reason for disqualification arguably raised by plaintiff came in her reply brief
06 where she stated, “[i]n the decision, the ALJ made no effort to address Plaintiff’s objections or
07 Declaration refuting the report, beyond noting that [the CDIU report] could not be ignored.”
08 (Dkt. 17 at 3.)

09 The ALJ properly considered the CDIU report as evidence. *See* 42 U.S.C. § 405(b)(1);
10 *Richardson v. Perales*, 402 U.S. 389, 400 (1971) (“strict rules of evidence, applicable in the
11 courtroom, are not to operate at social security hearings so as to bar the admission of evidence
12 otherwise pertinent”). This consideration does not establish bias, as evidenced by a number of
13 recent cases. *See, e.g., Robert v. Astrue*, 688 F. Supp. 2d 29, 37 (D. Mass. 2010) (CDIU report
14 “provides ample support for the ALJ’s decision denying benefits”); *Knox v. Astrue*, 660 F.
15 Supp. 2d 790, 800 (S.D. Tex. 2009) (remanding, in part, because the CDIU report was
16 insufficient to support the ALJ’s decision); *Zargi v. Comm’r of Soc. Sec.*, No. CIV
17 S-08-1677-CMK, 2009 WL 1505311, at *3 (E.D. Cal. May 27, 2009) (ALJ relied, in part, on
18 CDIU report in discrediting plaintiff and rejecting the opinions of two examining physicians).
19 Plaintiff has cited to no case, nor has this Court found one, in which the ALJ’s reliance on a
20 CDIU report supported a finding that plaintiff’s due process rights were violated.

21 Furthermore, plaintiff failed to take advantage of additional procedural safeguards.
22 Plaintiff had a qualified regulatory right to request the presence of the detectives at the

01 disability hearing for purposes of cross-examination, but failed to make this request. 20 C.F.R.
02 § 404.950(d)(1) (“When it is reasonably necessary for the full presentation of a case, an
03 administrative law judge or a member of the Appeals Council may, on his or her own initiative
04 or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and
05 for the production of books, records, correspondence, papers, or other documents that are
06 material to an issue at the hearing.”). Alternatively, plaintiff could have submitted
07 interrogatories to the detectives to challenge the basis for their findings, but also failed to do so.
08 *See Solis v. Schweiker*, 719 F.2d 301, 302 (9th Cir. 1983) (“interrogatories can adequately
09 replace in-court testimony where factual questions such as foundation or expertise are at
10 issue”).

11 Plaintiff fails to demonstrate error in the ALJ’s reliance on the CDIU report. *See, e.g.,*
12 *Robert*, 688 F. Supp. 2d at 38 (“to the extent a report provides factual rather than interpretive
13 data, and to the extent the administrative law judge provides the claimant with an opportunity to
14 address the report...the report may be given appropriate weight based on all the
15 circumstances”). The ALJ did not rely solely on the CDIU report at any stage of her analysis.
16 Furthermore, the record as a whole showed fundamental fairness for plaintiff. *Bayliss*, 427
17 F.3d at 1215-16.

18 Credibility

19 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
20 reject a claimant’s testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *see*
21 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant’s testimony unreliable,
22 an ALJ must render a credibility determination with sufficiently specific findings, supported by

01 substantial evidence. “General findings are insufficient; rather, the ALJ must identify what
02 testimony is not credible and what evidence undermines the claimant’s complaints.” *Lester v.*
03 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “We require the ALJ to build an accurate and logical
04 bridge from the evidence to her conclusions so that we may afford the claimant meaningful
05 review of the SSA’s ultimate findings.” *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003).
06 “In weighing a claimant’s credibility, the ALJ may consider his reputation for truthfulness,
07 inconsistencies either in his testimony or between his testimony and his conduct, his daily
08 activities, his work record, and testimony from physicians and third parties concerning the
09 nature, severity, and effect of the symptoms of which he complains.” *Light v. Soc. Sec.*
10 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

11 The ALJ found plaintiff’s statements concerning the intensity, persistence, and limiting
12 effects of her symptoms not credible to the extent inconsistent with the RFC assessment,
13 providing the following reasoning:

14 Along the line of third party opinion, the undersigned could not ignore the
15 Cooperative Disability Investigations Unit Report from August 2007. At that
16 time, the claimant was observed to exhibit no physical difficulties or limitations
17 by Detective Brian Monteer and his associate. Both, the claimant and Ms.
18 Southard [were] pleasant, cooperative, wearing nurse style outfits. The
19 claimant was also observed to have worn make-up and [drove] a car. The
20 claimant and her significant other, Ms. Southard represented they were
21 employees of the Foot and Ankle Clinic. Ms. Southard at hearing testified she
22 worked there; whereas the claimant denied she worked there. Detective
Monteer interviewed collateral witnesses and Ms. Southard described the
claimant as having a “great memory.” The report conclusion was reason to
believe the claimant knowingly provided false information based on a
preponderance of the evidence standard. At that time, the claimant’s opinion
about her symptoms [was] disregarded along with reports from St. Peters
Hospital, Greater Lakes Mental Health, Sound Medical Group and Community
Health because they too were based on input from the claimant; a discredited
source. The investigative report also noted Ms. Southard was purportedly

01 receiving disability for being severely disabled.

02 After careful consideration of the objective evidence, together with the opinion
03 or statements by third parties, such as Kristin[e] Southard, Detective Monteer
04 and Stephen Schmidt, the undersigned finds that the claimant's medically
05 determinable impairments may allegedly cause the alleged symptoms.
06 However, the claimant's statements concerning the intensity, persistence and
07 limiting effects of these symptoms are not credible to the extent they are
08 inconsistent with the above residual functional capacity assessment. The
09 evidence showed the claimant had back and/or neck surgeries, including fusions
10 and that she remained on morphine to this day. The claimant testified she is
11 able to lift her right arm to shoulder level and no higher. Yet, there are no
12 objective tests or findings within the record evidence to support her neck and
13 back complaints. Yet, she had been repeatedly limited to the sedentary
14 exertional level with some limitations pertaining to her right scapula. The
15 undersigned has conceded this is a severe impairment. Nevertheless, there are
16 also records in evidence that describe extensive activities the claimant
17 participated in and continued to deny. As for the claimant's mental health
18 conditions, there are no objective tests in (i.e., MMPI, Trail Making, etc)
19 evidence to evaluate the claimant's underlying credibility. The claimant's
20 credibility is questionable because of the report of her claim pursuits contradict
21 her disability [claims]. She appeared motivated by secondary gain.

22 The medical records confirm the following, all of which was denied by the
claimant at the hearing: that she has filed lawsuits against former employers and
doctors, that she has filed a claim with Labor & Industries, that she has engaged
in narcotics seeking behavior. Medical records also confirm her engaging in
activities such as: learning to ride a motorcycle in 2004, running in March 2007.
These facts in light of the claimant's insistent denial, convince me that the
claimant is motivated by secondary gain and is not credible.

(AR 17-18; internal citations omitted.)

Plaintiff and the Commissioner agree that the record does not support the ALJ's
conclusion of secondary gain motivation. The parties also agree that substantial evidence does
not support the ALJ's conclusion that plaintiff engaged in narcotics seeking behavior. The
parties further agree that evidence of plaintiff riding a motorcycle in 2004 does not constitute a
clear and convincing reason for discrediting her, given that her alleged disability began in June

01 2006. However, the Commissioner argues that “the ALJ’s remaining reasons – plaintiff’s
02 activities and the medical evidence – sufficiently support the ALJ’s credibility finding.” (Dkt.
03 16 at 9.)

04 Plaintiff takes issue with the ALJ’s use of inconsistencies in the CDIU report as the
05 basis for disbelieving her subjective complaints. Plaintiff notes that the detectives only
06 “observed Plaintiff for a very brief period of time at the Clinic,” and “[t]heir observations did
07 not include Plaintiff actually working or involved in any activity that would have exacerbated
08 her physical or mental conditions.” (Dkt. 15 at 7.) Plaintiff also points out that the detectives
09 could have requested employment verification from the Clinic, but did not.

10 Plaintiff next criticizes the ALJ’s observation that the medical records confirm that she
11 was running when she hurt her knee in March 2007. She argues that the medical report is
12 consistent with her testimony that she was at her niece’s soccer game and tripped while walking
13 across the field.

14 Plaintiff also takes issue with the ALJ’s contention that objective medical findings do
15 not support her neck and back complaints. Plaintiff argues that testimony regarding pain may
16 not be disregarded simply for a lack of objective findings if a plaintiff has presented evidence of
17 an impairment that could reasonably produce pain. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th
18 Cir. 1996). Plaintiff points to evidence of impairments such as her lumbar and cervical
19 fusions, a bulging disc above the fused vertebrae, and winging of her scapula. She argues that
20 these impairments could reasonably have caused her pain. The Commissioner admits the ALJ
21 imprecisely stated that no objective tests or findings supported plaintiff’s neck and back
22 complaints. However, the Commissioner argues that reviewing the ALJ’s entire decision in

01 context shows the medical evidence contradicted plaintiff's testimony to the extent she alleged
02 having disabling limitations.

03 Despite the errors in the ALJ's credibility assessment, there is still substantial evidence
04 to support her determination. *Carmickle v. Commissioner, Soc. Sec. Admin.*, 533 F.3d 1155,
05 1162-63 (9th Cir. 2008) (where the ALJ provides specific reasons supporting an assessment and
06 substantial evidence supports the conclusion, an error in the assessment may be deemed
07 harmless; the relevant inquiry "is not whether the ALJ would have made a different decision
08 absent any error, . . . [but] whether the ALJ's decision remains legally valid, despite such
09 error.") (citing *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195-97 (9th Cir. 2004)).

10 An ALJ appropriately considers inconsistencies or contradictions between a claimant's
11 statements and her activities of daily living. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th
12 Cir. 2001); *Thomas*, 278 F.3d at 958-59. The ALJ, elsewhere in the decision, appropriately
13 identified discrepancies in plaintiff's testimony regarding the severity of her impairments.
14 (See AR 13-17.) For example, plaintiff testified that she was limited to lifting a glass of water
15 or a plate with her right hand. (AR 52.) However, she also testified that she could use a Wii
16 video game controller, fold laundry, and start doing the dishes. (AR 51, 56.) In addition, the
17 ALJ noted that plaintiff was able to carry a suitcase through an airport and admitted to
18 travelling by airplane to California to visit family. (AR 13, 864.) Plaintiff also testified that
19 she was not running in March of 2007 when she sprained her knee and wrist. (AR 43.) Yet,
20 the admittance sheet from St. Peter Hospital states that plaintiff "fell while running" and the
21 physician's notes state that plaintiff "fell in hole." (AR 706, 709.)

22 The ALJ also identified inconsistencies in plaintiff's activities as described in the CDIU

01 report. (AR 17-18.) For example, the ALJ appropriately considered that plaintiff was
02 observed wearing a nurse outfit and represented to Detective Monteer that she worked at the
03 Foot and Ankle Clinic. *See Smolen*, 80 F.3d at 1284 (ALJ may consider work record as factor
04 in discounting credibility). At the hearing, plaintiff denied working at the clinic (AR 42), and
05 in her declaration stated that she only went to the clinic to be near Ms. Southard, and spent her
06 time there watching movies in the employee lounge (AR 281). Yet, plaintiff detailed to
07 Detective Monteer the specific duties she performed at the clinic, such as answering phones,
08 filing, assisting with obtaining preliminary information from patients regarding their injuries,
09 and helping patients with sitting and standing. (AR 86.) Plaintiff also testified that her
10 memory is “not that good” (AR 58), but told Detective Monteer that she has a good memory,
11 while Ms. Southard told Detective Monteer that plaintiff has a “great memory” (AR 86).

12 The ALJ also appropriately pointed to plaintiff’s testimony that her doctor told her she
13 would be taking prescription narcotics “forever.” (AR 17, 43.) *See Tonapetyan*, 242 F.3d at
14 1148 (an ALJ appropriately considers inconsistency with the evidence and a tendency to
15 exaggerate in rejecting a claimant’s testimony). The ALJ described plaintiff’s statement as
16 “an incredulous opinion[]” (AR 17), and, although not necessarily indicative of narcotics
17 seeking behavior, accurately reflected that a physician wanted her to reduce her narcotics use
18 (*id.* (citing AR 402 (2003 treatment note showing that Dr. Keith Demirjian had a “lengthy
19 discussion” with plaintiff about tapering her off of Vicodin and placing more reliance on
20 Tylenol, heat, and swimming))).

21 Finally, the ALJ also appropriately considered that objective tests and findings within
22 the medical record did not support the severity of plaintiff’s alleged symptoms. (AR 18.)

01 “While subjective pain testimony cannot be rejected on the sole ground that it is not fully
02 corroborated by objective medical evidence, the medical evidence is still a relevant factor in
03 determining the severity of claimant’s pain and its disabling effects.” *Rollins v. Massanari*,
04 261 F.3d 853, 857 (9th Cir. 2001). Here, the ALJ noted that while plaintiff testified she was
05 limited to lifting a glass of water or a plate with her right hand, she was repeatedly found
06 capable of sedentary work activity, which is the ability to lift up to ten pounds maximum and
07 frequently lift and/or carry such articles as files and small tools. (AR 18 (citing AR 138-50,
08 859-63).)

09 In sum, the ALJ provided clear and convincing reasons for finding plaintiff less than
10 fully credible. The ALJ’s credibility assessment should be upheld.

11 Medical Opinions

12 In evaluating the weight to be given to the opinions of medical providers, Social
13 Security regulations distinguish between “acceptable medical sources” and “other sources.”
14 Acceptable medical sources include, for example, licensed physicians and psychologists, while
15 other non-specified medical providers are considered “other sources.” 20 C.F.R. §§
16 404.1513(a) and (e), 416.913(a) and (e), and Social Security Ruling (SSR) 06-03p.

17 In general, more weight should be given to the opinion of a treating physician than to a
18 non-treating physician, and more weight to the opinion of an examining physician than to a
19 non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another
20 physician, a treating or examining physician’s opinion may be rejected only for “‘clear and
21 convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
22 Where contradicted, a treating or examining physician’s opinion may not be rejected without

01 “‘specific and legitimate reasons’ supported by substantial evidence in the record for so doing.”
02 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

03 The ALJ may reject physicians’ opinions “by setting out a detailed and thorough
04 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
05 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
06 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ “must set forth his own
07 interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey*
08 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

09 Less weight may be assigned to the opinions of other sources. *Gomez v. Chater*, 74
10 F.3d 967, 970 (9th Cir. 1996). However, “[s]ince there is a requirement to consider all relevant
11 evidence in an individual’s case record,” the ALJ’s decision “should reflect the consideration of
12 opinions from medical sources who are not ‘acceptable medical sources’ and from
13 ‘non-medical sources’ who have seen the claimant in their professional capacity.” SSR
14 06-03p. “[T]he adjudicator generally should explain the weight given to opinions from these
15 ‘other sources,’ or otherwise ensure that the discussion of the evidence in the determination or
16 decision allows a claimant or subsequent reviewer to follow the adjudicator’s reasoning, when
17 such opinions may have an effect on the outcome of the case.” *Id.*

18 A. Dr. Katherine Landy

19 Dr. Katherine Landy, as plaintiff’s treating physician, and subsequently Certified
20 Physician Assistant (PA-C) Giang Vu, provided physical evaluations of plaintiff for DSHS
21 from 2006 to 2009. The ALJ assessed the opinions of Dr. Landy and PA-C Vu as follows:

22 In 2007 and 2008, Katherine Z. Landy, M.D. noted the claimant’s winged

01 scapula, cervical spine stenosis and wrist tendonitis resulted in limitations to
02 sitting, standing, lifting, handling and carrying. Dr. Landy also opined the
03 claimant[']s overall work level due to her physical medically determinable
04 impairments was at the sedentary level. However, with vocational
05 rehabilit[ation] Dr. Landy opined the claimant would improve employability.
06 Giang Vu, PA-C also opined in 2009 the claimant was capable of sedentary level
work activity, which is the ability to lift up to 10 pounds maximum, frequently
lift and/or carry such articles as files and small tools and may require sitting,
walking and standing for brief periods. The undersigned accorded great weight
to the opinions of Dr. Landy and PA-C Vu as they are consistent with the
evidence in record and are opinions from the claimant's treating providers.

07 (AR 21; internal citations omitted.)

08 Plaintiff argues that although the ALJ gave "great weight" to Dr. Landy's opinion, she
09 failed to account for this treating physician's finding of a restriction from work involving
10 "prolonged sitting." (Dkt. 15 at 16.) Plaintiff also argues the ALJ mischaracterized Dr.
11 Landy's assessment of the effect that vocational rehabilitation would have on plaintiff's
12 employability. (*Id.*)

13 As the Commissioner argues, the ALJ's characterization of Dr. Landy's opinion
14 regarding vocational rehabilitation is irrelevant. Dr. Landy noted that vocational rehabilitation
15 "was recommended" to improve plaintiff's employability. (AR 846.) The ALJ stated that it
16 was Dr. Landy's opinion that this rehabilitation "would" improve employability. (AR 21.)
17 Regardless of whether the ALJ's interpretation was correct, on three separate occasions Dr.
18 Landy opined that plaintiff was currently capable of performing sedentary work, without any
19 further need for rehabilitation. (AR 740, 746, 845.) This was the opinion given weight by the
20 ALJ in assessing plaintiff's RFC.

21 However, the ALJ did not account for Dr. Landy's opinion as to a limitation on
22 plaintiff's ability to sit for long periods of time. Dr. Landy noted a marked limitation in

01 plaintiff's ability to sit due to cervical spine stenosis in July 2006, June 2007, and June 2008.
02 (*Id.*) PA-C Vu also opined that plaintiff had a marked limitation with sitting when he
03 evaluated her in May 2009. (AR 861.) While Dr. Landy nonetheless assessed plaintiff as
04 capable of sedentary work, she also noted that plaintiff experiences numbness from prolonged
05 sitting and, on one occasion, specifically opined that she is "unable to sit for long periods of
06 time."² (AR 747, 847.)

07 The only medical evidence contradicting Dr. Landy's opinion comes from reviewing
08 State agency consultant Debra Stocker, whose opinion appears to have been affirmed by Dr.
09 Wayne Hurley.³ (AR 788, 837.) She opined in December 2007 that plaintiff was capable of
10 sitting with normal breaks for a total of about six hours in an eight hour workday. (AR 788.)
11 The ALJ acknowledged this report and found it deserved weight. (AR 18.) However, the
12 opinion of a non-examining physician cannot by itself constitute substantial evidence that

13
14 ² Plaintiff also argues that the definition of sedentary work on the DSHS forms completed by
15 Dr. Landy and Vu are not consistent with the sitting requirements for sedentary work. (*Compare* AR
16 740 ("A sedentary job may require sitting, walking, and standing for brief periods."), *with* 20 C.F.R. §§
17 404.1567(a), 416.967(a) ("Although a sedentary job is defined as one which involves sitting, a certain
18 amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if
19 walking and standing are required occasionally and other sedentary criteria are met. ")); *see also*
20 *Vertigan*, 260 F.3d at 1052 ("In a work environment requiring sedentary work, the Social Security Rules
21 require necessary sitting as the ability to do such for six to eight hours a day.") (citing SSR 83-10).
22 However, the Court concludes this argument does not have merit. The DSHS form definition does not
necessarily preclude the need for prolonged sitting. Indeed, it is unclear what jobs would qualify as
sedentary if individuals could only sit, walk, *and* stand for brief periods. As reflected in the Social
Security regulations, sedentary work necessarily requires limited walking and standing, and, therefore,
greater periods of sitting.

³ It is not entirely clear whether Dr. Hurley reviewed Debra Stocker's physical evaluation from
December 12, 2007, or Dr. Postvoit's mental evaluation from December 12, 2007. Dr. Hurley states "I
[have] reviewed all evidence on file and the assessment of 12/12/2007 is affirmed as written." (AR
837.) Regardless of which evaluation he affirmed, the analysis of plaintiff's physical and mental
limitations remains the same.

justifies the rejection of the opinion of a treating physician. *Lester*, 81 F.3d at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). Moreover, the ALJ did not specifically address the finding as affirmed by Dr. Hurley, or in any respect acknowledge or discuss Dr. Landy's assessment of a limitation on prolonged sitting. The ALJ should, on remand, reassess the evidence from Dr. Landy as related to a limitation on plaintiff's ability to sit for prolonged periods.⁴

B. Dr. Esparza

Dr. Brian Esparza performed a mental examination of plaintiff for Disability Determination Services in April 2006. The ALJ assessed Dr. Esparza's opinions as follows:

[C]onsultative examiner Brian Esparza, M.D. opined in August 2006 the claimant demonstrated several strengths which included clear orientation. The claimant was able to recall past information and scored 3/3 in digit recall both forward and backward. The claimant also reported she was cleaning the home regularly and compulsively while taking care of animals. She also expressed her ability to prepare her own meals. Due to educational constraints, Dr. Esparza opined the claimant had difficulty recalling serial seven's. Yet, she was able to spell *world* forward and backward and follow a three step command without difficulty. Dr. Esparza opined the claimant demonstrated consistent employment in the past and it translated to "real world employability." He ruled out a psychotic and bipolar disorder. However, he did conclude employment difficulties were due to depression, panic disorder and post-traumatic stress disorder. He also opined in 2006 the claimant was unable to attend work on a regular and consistent basis. The undersigned considered the opinion of Dr. Esparza and accorded him some weight because certain aspects of Dr. Esparza's opinion are in fact consistent with the current residual functional capacity determined in this decision (i.e., the claimant had difficulty with interpersonal interactions today.) However, his opinion is not supported by objective testing and appeared to be influenced by the self reports of the claimant which Dr. Esparza confined to that specific period of time with no

⁴ The Court notes that, pursuant to SSR 83-12: "Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a [VE] should be consulted to clarify the implications for the occupational base."

01 concrete conclusion the claimant was precluded from work activities in the
02 future (i.e. "...good prognostic fact for the future.")

03 (AR 18-19; internal citations omitted.)

04 Plaintiff appeared, in her opening brief, to take issue with the ALJ's decision to afford
05 limited weight to Dr. Esparza's opinions. (*See* Dkt. 15 at 15.) However, plaintiff merely
06 recited the ALJ's reasoning for affording Dr. Esparza's opinions limited weight and did not
07 write even one sentence describing how the ALJ erred in his evaluation.⁵ Respondent noted
08 plaintiff's apparent failure to allege any error and plaintiff, in her reply, did not refute this
09 assertion or otherwise address any issues in relation to the opinions of Dr. Esparza.
10 Accordingly, the Court considers this claim to be forfeited. *See Independent Towers of Wash.*
11 *v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (court will not consider any claims that were not
12 specifically and distinctly argued in a party's opening brief); *see also Vandenoorn v. Barnhart*,
13 421 F.3d 745, 750 (8th Cir. 2005) (rejecting out of hand conclusory assertion that ALJ failed to
14 consider whether claimant met listings because claimant provided no analysis of relevant law or
15 facts regarding listings); *Perez v. Barnhart*, 415 F.3d 457, 462 n. 4 (5th Cir. 2005) (argument
16 waived by inadequate briefing). It is not enough merely to present an argument in the
17 skimpiest way, and leave the Court to do counsel's work—framing the argument and putting
18 flesh on its bones through a discussion of the applicable law and facts. *See, e.g., Murrell v.*
19 *Shalala*, 43 F.3d 1388, 1389 n. 2 (10th Cir. 1994) (perfunctory statements fail to frame and
20 develop issue sufficiently to invoke appellate review).

21 ⁵ Plaintiff did take issue with a finding relating to Dr. Esparza in arguing the ALJ failed to
22 develop the record. (Dkt. 15 at 20.) That specific argument is addressed separately below.

01 C. DSHS Evaluators

02 Plaintiff also challenges the ALJ's decision to give limited weight to the opinions of
03 DSHS evaluators. The Court notes that the DSHS evaluators are not acceptable medical
04 sources per 20 C.F.R. § 404.1513 and, therefore, constitute other sources. *See Turner v.*
05 *Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010) (lay testimony from other sources
06 may be expressly disregarded if the ALJ gives germane reasons for doing so). One mental
07 status reassessment form completed by Dawn Stremel also contained the signature of a licensed
08 psychologist. However, as discussed below, this report supports the ALJ's findings. (AR
09 756-59.)

10 The ALJ assessed the opinions of the DSHS evaluators as follows:

11 The record evidence also contained subsequent DSHS psychological
12 evaluations by Kimberly Cole, MA, MHP, (2006) Dawn Stremel, MA, MHP
13 (2007), Michael T. Werner, MSW, MHP (2008) and Kimberly M. Johnson, MA,
14 MHP (2009). They reflect opinions that the claimant's access to mental health
15 treatment would restore or substantially improve the claimant's ability to work
16 for pay in a regular and predictable manner in 2006, 2007 and 2009. In 2008,
17 Mr. Werner reported due to the "client's concurrent medical problems" it was
18 "doubtful" mental health treatment would improve her ability to work. In 2006
19 Kimberly Cole, MA, MHP opined without objective testing the claimant had a
20 marked severity in her ability to understand, remember and follow more than
21 two step instructions; in her ability to relate appropriately with co-workers and
22 supervisors; and in her ability to care for herself, including personal hygiene and
appearance. Ms. Cole also opined the claimant had a severe limitation in her
ability to interact appropriately in public contacts. In 2007 and 2008, the
"marked" and "severe" limitations were variations of those described by the
other DSHS evaluators and also based on the claimant reports. By 2009, Ms.
Johnson rendered an opinion based upon "subjective report and objective
observation through ongoing therapy..." the claimant had no "severe"
limitations; but, had "marked" limitations in her ability to relate to co-workers
and supervisors; in her ability to interact appropriately in public contacts; and, in
her ability to control physical or motor movements and maintain appropriate
behavior. Generally as DSHS examiners, they do not constitute treating
sources and the weight accorded to their opinions regarding the claimant's

01 ability to work is limited by the fact they base their conclusions solely upon a
02 one-time conclusory evaluations (sic) and/or mental status exam. The weight
03 that can be accorded to the opinions of the DSHS evaluators is further limited by
04 the significant reliance they appeared to have placed upon the subjective
05 allegations of an individual with documented credibility issues and secondary
06 gain motivation for entitlement to state general assistance benefits.

07 However, there is a possibility a therapist may express an opinion in an effort to
08 assist a patient with whom he or she sympathizes for one reason or another.
09 While it is difficult to confirm the presence of said motives, they are more likely
10 in situations where the opinion in question departs substantially from the rest of
11 the evidence in the record, as in the current case. For example, in the
12 examination from Greater Lakes Mental Health in June 2007, Ms. Stremel and
13 her supervisor, Pam Sarlund-Heinrick, Psy.D. opined the claimant had a GAF of
14 51 and her judgment was “fair;” the claimant was “appropriately social” and that
15 she had “minor difficulty” with short and long term memory. Yet, in the DSHS
16 evaluation dated June 7, 2007, Ms. Stremel noted the claimant had a “marked”
17 severity with exercising judgment, “marked” severity in her ability to relate
18 appropriately, which conflict with the Greater Lakes assessment. At a
19 minimum, it calls to question the level of sympathy, and objectivity for that
20 matter, a therapist has with respect to seeing their (sic) patients acquire general
21 assistance benefits and continue treatment with the therapist. Irrespective of
22 the motivation, the reliability of the DSHS evaluation opinions are accorded less
weight [due] to many factors discussed herein.

14 (AR 19-20; internal citations omitted.)

15 Plaintiff notes the ALJ’s finding that the DSHS evaluators based their opinions upon
16 single examinations and relied on plaintiff’s subjective complaints. (*See* Dkt. 15 at 15.)
17 However, as with Dr. Landy, plaintiff does not identify or discuss any error in these findings.
18 (*Id.*)

19 Plaintiff does specifically argue that it is improper for an ALJ to assume that doctors, or,
20 as in this case, therapists, lie in order to help their clients obtain benefits in the absence of
21 evidence of actual impropriety. *Lester*, 81 F.3d at 832. She also denies any discrepancy in
22 the two evaluation forms completed by Ms. Stremel, stating they were prepared for different

01 reasons requiring different levels of specificity.

02 As conceded by the Commissioner, the ALJ's speculation as to the DSHS evaluators'
03 motivation was extraneous. (AR 20 (the ALJ clarified that "[i]rrespective of the motivation,
04 the reliability of the DSHS evaluation opinions are accorded less weight [due] to many factors
05 discussed herein.))) The ALJ correctly notes discrepancies between the June 7, 2007 internal
06 reassessment completed by Ms. Stremel and her supervisor and the June 7, 2007 DSHS
07 evaluation completed by Ms. Stremel. Ms. Stremel opined in the reassessment that plaintiff's
08 appearance, thought process, orientation, behavior, speech, and energy were all appropriate.
09 (AR 756-57.) In addition, she opined that plaintiff was appropriately social and had fair
10 judgment and insight, and a Global Assessment of Functioning (GAF) score of 51.⁶ Yet, on
11 the DSHS form, Ms. Stremel opined that plaintiff was markedly limited in exercising judgment
12 and making decisions; relating appropriately to co-workers and supervisors; interacting
13 appropriately with public contacts; and responding appropriately to and tolerating the pressure
14 and expectations of a normal work setting. (AR 752.) Accordingly, the ALJ appropriately
15 considered discrepancies between the two reports. *See Bayliss*, 427 F.3d at 1216
16 (discrepancies between doctor's notes and opinions is a clear and convincing reason for not
17 relying on the doctor's opinion).

18 The ALJ also found that the evaluators' opinions departed substantially from the rest of
19 the evidence in the record. Inconsistency with medical evidence is a germane reason for
20

21 ⁶ A GAF score of 51-60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial
22 speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning
(e.g., few friends, conflicts with peers or co-workers)." Diagnostic and Statistical Manual of Mental
Disorders 34 (4th ed. 2000) (DSM-IV-TR).

01 discrediting lay testimony. *Bayliss*, 427 F.3d at 1218. As discussed below, the ALJ properly
02 relied on the medical opinions of the reviewing State agency physicians which contradicted the
03 opinions of the DSHS evaluators. (AR 18, 600, 704-05, 795, 836.) The ALJ is responsible
04 for resolving conflicts in the medical record, *Carmickle*, 533 F.3d at 1164, and when evidence
05 reasonably supports either confirming or reversing the ALJ's decision, we may not substitute
06 our judgment for that of the ALJ, *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).
07 Here, the fact that the DSHS evaluators' opinions were contradicted by other opinions from
08 acceptable medical sources provided a germane reason for the ALJ to discount their opinions.
09 *See Gomez*, 74 F.3d at 970 (less weight may be assigned to the opinions from other sources than
10 from acceptable medical sources). In addition, as discussed above, the ALJ also appropriately
11 took into consideration contradictory evidence from the CDIU report as to plaintiff's activities.
12 *See Carmickle*, 533 F.3d at 1164 (contradictory evidence of plaintiff's activities supported
13 ALJ's rejection of lay testimony as to symptoms).

14 Finally, the ALJ also concluded that the DSHS evaluators appeared to rely significantly
15 on the subjective allegations of an individual with documented credibility issues. While there
16 appears to have been other evidence relied upon (*see* AR 632, 634-45, 734-55, 856), the
17 evaluation forms do reflect significant echoing of statements made by plaintiff (*see, e.g.,* AR
18 752, 755, 840). The ALJ's conclusion that evaluators relied on plaintiff's subjective
19 complaints can, therefore, be deemed a rational interpretation of the evidence. For this reason,
20 and for the reasons described above, plaintiff fails to demonstrate error in the ALJ's
21 consideration of the DSHS evaluators' opinions.

22 ///

01 D. Reviewing State Agency Physicians

02 Plaintiff also argues that the ALJ improperly credited the opinions of reviewing State
03 agency physicians. The ALJ assessed those opinions as follows:

04 The residual functional capacity conclusions reached by the physicians
05 employed by the State disability determination services also support a finding of
06 'not disabled.' Although these physicians were non-examining and therefore
07 their opinions do not as a general matter deserve as much weight as those of
08 examining or treating physicians, those opinions do deserve some weight,
09 particularly in a case like this in which there exist a number of other reasons to
10 reach similar conclusions, as explained throughout this decision.

11 (AR 18; internal citations omitted.)

12 Plaintiff argues that the Mental Residual Functional Capacity Assessment (MRFCA)
13 completed by Dr. Michael Regets prior to the CDIU investigation, and later affirmed by Drs.
14 Thomas Clifford and Alfred Dickson, conflicts with assessments completed after the
15 investigation. Dr. Regets opined in May 2006 that plaintiff had various moderate limitations.
16 (*See* AR 598-601.) In a subsequent evaluation completed by Dr. Leslie Postvoit in December
17 2007, and later affirmed by Dr. Carla van Dam, plaintiff was found to have only a mild
18 limitation in maintaining social functioning and no other limitations caused by mental
19 impairment.⁷ (AR 805, 836.) Plaintiff argues that the ALJ made no effort to reconcile these
20 conflicts aside from reliance on the CDIU report.

21 As discussed above, it was proper for the ALJ to consider the CDIU report as evidence.
22 Likewise, as argued by the Commissioner, the State agency physicians appropriately

⁷ As discussed in footnote 3, it is unclear whether Dr. Hurley affirmed Debra Stocker's physical evaluation or Dr. Postvoit's mental evaluation.

01 considered the CDIU report as new and material evidence to consider in their evaluations.⁸

02 Further, the ALJ's failure to discuss discrepancies between the medical opinions issued
03 before and after the CDIU report can be deemed harmless. In fact, although Drs. Regets,
04 Clifford, and Dickson opined that plaintiff had various moderate limitations, the conclusions in
05 the evaluation nonetheless comport with the ALJ's RFC assessment. (See AR 598-601.) In
06 the narrative portion of the MRFC form, Dr. Regets concluded that plaintiff can perform some
07 "complex tasks;" "has sustained regular work in the past;" "can interact w[ith] a few coworkers
08 that she is comfortable w[ith] and a supervisor;" "should not interact w[ith] the public on a
09 more than superficial basis;" "is capable of adaptation in the work place;" and "is functioning in
10 a manner that would allow her to participate in work like activity."⁹ (AR 600.) The Court
11 concludes that the limitation of working with things not people adequately addressed the
12 limitations assessed by these physicians. Furthermore, as plaintiff points out in her briefing,
13 the ALJ is not required to discuss all evidence presented and must only explain the rejection of
14 significant probative evidence. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984).
15 Here, the ALJ cited to the opinions of all of the non-examining physicians in concluding that

16 _____
17 8 Although not specifically argued by plaintiff, the Court notes that Dr. Postvoit relied on
18 hearsay statements from plaintiff's trailer park manager in concluding that plaintiff was abusing
19 narcotics. As discussed earlier, substantial evidence does not support a finding that plaintiff engaged in
20 drug seeking behavior. However, Dr. Postvoit also stated that the overuse of narcotics "[does] not
21 appear to impact her functioning." (AR 807.) Whatever error may have occurred, therefore, is
22 harmless, as it does not appear that Dr. Postvoit's opinions regarding plaintiff's functioning were
influenced by the possibility of substance abuse.

20 ⁹ "The purpose of section I . . . on the [MRFC] is chiefly to have a worksheet to ensure that the
21 psychiatrist or psychologist has considered each of these pertinent mental activities and the claimant's
22 or beneficiary's degree of limitation for sustaining these activities over a normal workday and
workweek on an ongoing, appropriate, and independent basis. It is the narrative written by the
psychiatrist or psychologist in section III . . . of [the MRFC] that adjudicators are to use as the
assessment of RFC." Program Operations Manual System (POMS) DI 25020.010 at B.1.

01 they supported a finding of “not disabled.” (AR 18.)

02 Lay Testimony

03 Lay witness testimony as to a claimant’s symptoms or how an impairment affects ability
04 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
05 The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each
06 witness. *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members
07 because, *inter alia*, they were “understandably advocates, and biased” amounted to “wholesale
08 dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a
09 reason germane to each individual who testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918
10 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (“[L]ay testimony
11 as to a claimant’s symptoms is competent evidence that an ALJ must take into account, unless
12 he or she expressly determines to disregard such testimony and gives reasons germane to each
13 witness for doing so.”). “[W]here the ALJ’s error lies in a failure to properly discuss
14 competent lay testimony favorable to the claimant, a reviewing court cannot consider the error
15 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the
16 testimony, could have reached a different disability determination.” *Stout v. Comm’r of Soc.*
17 *Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

18 Plaintiff argues that the ALJ erred in limiting the weight given to Ms. Southard’s lay
19 opinions. The ALJ considered the lay testimony of Ms. Southard as follows:

20 The undersigned considered evidence, such as the testimony of the claimant’s
21 significant other, Kristin[e] Southard and considered this evidence as a
22 non-medical source, and had not seen the claimant in a professional capacity in
connection with her impairments. The undersigned considered factors such as
the nature and extent of the relationship between the claimant and the

01 non-medical source; whether the evidence is consistent with other evidence;
02 and, other factors that tend to support or refuse (sic) the source statements. The
03 undersigned afforded some weight to the opinion of Ms. Southard due to her
04 long-term relationship and personal observations of the claimant in the current
05 residual functional capacity. However, her information may have an indicia of
06 unreliability because her report is based upon the claimant's self-reported
symptoms and not based upon medical facts or diagnostic testing.
Furthermore, Ms. Southard has a financial interest in the outcome of this case as
they have shared a home and finances for over 15 years. . . . Both Ms. Southard
and Mr. Schmidt describe the claimant's withdraw[al] from social interaction
and it was considered in the current residual functional capacity.

07 (AR 17; internal citations to the record omitted.)

08 Plaintiff asserts that the lay testimony was consistent with her testimony, as well as the
09 opinions of Dr. Esparza and the DSHS evaluators. Plaintiff argues that lay testimony is not
10 required to be supported by medical testing, *Smolen*, 80 F.3d at 1289, and avers that Ms.
11 Southard's testimony was based on her personal observations of plaintiff and not on plaintiff's
12 self-reported symptoms, *see Dodrill*, 12 F.3d at 918-19. Finally, plaintiff argues that it was
13 legal error for the ALJ to reject Ms. Southard's testimony because she may be an "interested
14 party." *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (citing
15 *Dodrill*, 12 F.3d at 918-19).

16 The Commissioner concedes that Ms. Southard based her testimony on direct
17 observation, rather than upon plaintiff's subjective reports, as well as that her testimony did not
18 require medical confirmation. He additionally agrees that an ALJ may not discredit a lay
19 witness because she is an interested party, while noting dicta in *Valentine* stating "evidence that
20 a specific spouse exaggerated a claimant's symptoms *in order* to get access to [plaintiff's]
21 disability benefits, as opposed to being an 'interested party' in the abstract, might suffice to
22 reject that spouse's testimony." *Id.* (emphasis in original).

01 The Commissioner argues, however, that any of the purported errors in the analysis are
02 harmless given that the ALJ properly considered and weighed the overall record in giving only
03 some weight to Ms. Southard's testimony. He points, in particular, to inconsistencies between
04 plaintiff's activities and Ms. Southard's testimony that plaintiff mostly stayed home and could
05 not do anything. See *Carmickle*, 533 F.3d at 1164 (contradictory evidence of plaintiff's
06 activities supported ALJ's rejection of lay testimony as to symptoms). The Commissioner
07 also points to the contradictory medical evidence as a germane reason for discrediting this lay
08 testimony. *Bayliss*, 427 F.3d at 1218.

09 In the paragraph following her discussion of the lay witness testimony, and as reflected
10 in the excerpt above, the ALJ specifically discussed Ms. Southard in the context of the CDIU
11 report. A reasonable inference can be drawn that the ALJ relied on inconsistencies between
12 Ms. Southard's testimony and her statements and the findings in the CDIU report as a germane
13 reason for limiting the weight afforded her testimony. See *Magallanes*, 881 F.2d at 755 ("As a
14 reviewing court, we are not deprived of our faculties for drawing specific and legitimate
15 inferences from the ALJ's opinion."). The CDIU discussion further supports the conclusion
16 that Ms. Southard has a more than abstract financial interest in the outcome of this case. Ms.
17 Southard testified that she and plaintiff have been living together for about sixteen years. (AR
18 72.) She also testified that plaintiff remains at home while she goes to work, and that plaintiff
19 spends her days either in bed or on the couch laying around and watching television. (AR 74.)
20 Yet, the CDIU report indicates that plaintiff worked at the Foot and Ankle Clinic, and exhibited
21 no physical difficulties or limitations while being observed by investigators. (AR 86.) Ms.
22 Southard also testified that plaintiff does not read instructions well, cannot remember how to

01 open a computer game even though she has been shown how to do so many times, and does not
02 open the mail because she would not understand it. (AR 77.) Conversely, Ms. Southard told
03 CDIU investigators that plaintiff has a “great memory[,]” while the investigators reported
04 plaintiff “was pleasant and cooperative and was able to follow the conversation and respond
05 without any hesitation.” (AR 86-87.) Taken together, the inconsistencies between Ms.
06 Southard’s testimony and the CDIU report arguably provides evidence that Ms. Southard
07 exaggerated plaintiff’s symptoms in order to gain access to plaintiff’s disability benefits.

08 On the other hand, the ALJ did not, in addressing the lay testimony, explicitly state that
09 Ms. Southard’s testimony was contradicted by the CDIU report or other evidence of plaintiff’s
10 activities. Nor did the ALJ point to inconsistencies with the medical record or the record as a
11 whole. Instead, she appeared to improperly assume that the lay testimony was based on
12 plaintiff’s self reports and relied on an absence of corroborating medical support. Therefore,
13 on remand, the ALJ should provide a more detailed assessment of Ms. Southard’s lay
14 testimony.

15 ALJ’s Duty to Develop the Record

16 Plaintiff argues that evidence of her mental impairments was ambiguous, and the ALJ
17 erred in not developing the record further. *See Tonapetyan*, 242 F.3d at 1150 (“The ALJ in a
18 social security case has an independent duty to fully and fairly develop the record and to assure
19 that the claimant's interests are considered.”) (internal quotation marks and quoted sources
20 omitted) and *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (“An ALJ’s duty to
21 develop the record further is triggered only when there is ambiguous evidence or when the
22 record is inadequate to allow for proper evaluation of the evidence.”). She points to the limited

01 weight assigned to evaluations of her mental impairments based on the absence of objective
02 testing. (*See* Dkt. 15 at 20 (citing AR 19).) Plaintiff avers that there was no reason for her
03 counselors to conduct testing and that it was not her fault Dr. Esparza failed to perform testing.
04 Noting that the ALJ gave her “the benefit of the doubt” in assessing limitations in the RFC (AR
05 21), plaintiff argues that, if there was some ambiguity testing would have helped resolve, the
06 ALJ had a duty to develop the record and request another consultative examination.

07 As noted by the Commissioner, however, Dr. Esparza did perform a mental status
08 evaluation. The ALJ recounted the results of that evaluation, including plaintiff’s clear
09 orientation and successful recall and concentration abilities. (AR 18-19, 580-83.) She
10 thereafter concluded that Dr. Esparza’s opinions were “not supported by objective testing[.]”
11 (AR 19.) This finding could, therefore, be rationally read to mean that the ALJ concluded Dr.
12 Esparza’s own testing results did not support his opinions as to plaintiff’s limitations.

13 In any event, even reading the decision to imply that the ALJ concluded Dr. Esparza and
14 other mental health evaluators failed to support their opinions with *any* objective testing,
15 plaintiff fails to demonstrate error. The ALJ provided several reasons for affording only some
16 weight to Dr. Esparza’s opinions, including a lack of support by objective testing, the apparent
17 influence of plaintiff’s self-reports, and indications that Dr. Esparza did not proffer a “concrete
18 conclusion that claimant was precluded from work activities in the future (i.e. “. . . good
19 prognostic fact for the future.”) (AR 19.) He likewise, as explained above, provided
20 sufficient reasons for affording limited weight to the opinions of the DSHS evaluators.

21 The ALJ made no finding that the evidence was ambiguous or that the record was
22 inadequate to allow for proper evaluation. Nor did any of the medical evaluators find that

01 evidence of plaintiff's alleged impairments was ambiguous. *See Tonapetyan*, 242 F.3d at
02 1150 (ALJ "was not free to ignore Dr. Walter's specific recommendation that a more detailed
03 report from Dr. Trabulus be obtained"). As discussed above, the ALJ's findings regarding
04 plaintiff's mental impairments were supported by medical opinions from the reviewing
05 physicians, the CDIU report, and other evidence of plaintiff's activities. The evidence was
06 conflicting, but not ambiguous. For these reasons, plaintiff fails to support the contention that
07 the ALJ erred in failing to develop the record further.

08 **CONCLUSION**

09 For the reasons set forth above, this matter should be REMANDED for further
10 administrative proceedings.

11 DATED this 28th day of July, 2011.

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14 Mary Alice Theiler
15 United States Magistrate Judge
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